No. 4575.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
JUN 8 - 1925
F. D. MONCKTON,
CLERK.

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STATEMENT OF THE CASE.

On or about the 17th day of October, 1924, an information was filed in the District Court of the United States, of in and for the Southern District of California, Southern Division, which information contained five counts charging the plaintiffs in error herein with a violation of the National Prohibition Act.

In count I of said information it was averred that the said plaintiffs in error did, on or about the 28th day of July, 1924, sell for beverage purposes, to one,

I. W. Cory, one bottle of intoxicating liquor at the agreed price of five dollars ($5.00); in the second count of said information, said plaintiffs in error were charged with selling, on or about the 30th day of July, 1924, a bottle of intoxicating liquor to one, C. W. Ahlin, at a price of seven dollars ($7.00); in the third count it was charged that the plaintiffs in error did, on or about the 7th day of August, 1924, sell to one, Paul Hooke, a pint of intoxicating liquor for seven dollars ($7.00); in the fourth count it was charged that the plaintiffs in error did, on or about the 29th day of August, A. D. 19. . . ., have in their possession about three quarts and one pint of intoxicating liquor; in the fifth count it was alleged that the plaintiffs in error did, on or about the 29th day of August, 1924, maintain a common nuisance in Los Angeles, California, where intoxicating liquor was manufactured, kept, sold and bartered for beverage purposes.

To each and every count in said information contained, each of the plaintiffs in error did enter their plea of "Not Guilty."

There was joined, as a defendant, in the court below, with these plaintiffs in error, one, John Doe Ellis, who was not apprehended at the time of the trial of said cause, and which action against said defendant, Ellis, is still pending in said District Court.

That thereafter, trial of the above entitled cause was had, and the jury returned a verdict, finding the plaintiff in error, Herman Landfield, guilty, as charged in the first count of the information, guilty, as charged

in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty, as charged in the fifth count of the information.

The jury found the plaintiff, J. W. Oliver, not guilty as charged in the first count of the information, not guilty, as charged in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty as charged in the fifth count of the information.

A motion for a new trial having been made in behalf of the defendants in the court below upon the usual statutory grounds, and said motion having been denied, the Honorable Court below made its judgment and sentence that the plaintiff in error, Herman Landfield, be imprisoned in the Orange county jail, in the county of Orange, California, for the term and period of six (6) months upon each of the first and second counts, said terms of imprisonment to begin and run concurrently, and that said plaintiff in error, Landfield, be imprisoned in the Orange county jail for the term and period of one (1) year upon the fifth count of the information, to begin and run concurrently with the terms of imprisonment imposed on the first and second counts, and to pay unto the United States of America, a fine in the sum of one thousand dollars ($1,000.00), and stand committed to the said Orange county jail until said fine shall have been paid, and

upon the fourth count said plaintiff in error, Landfield, was adjudged to pay a fine of one dollar ($1.00.)

As to the plaintiff in error, J. W. Oliver, the Honorable Court below ordered and adjudged that he pay a fine of one dollar ($1.00) on the fourth count of the information, and stand committed to the Orange county jail in the county of Orange, California, for the term and period of six (6) months on the fifth count of said information.

In view of the fact that the court instructed the jury to find the plaintiffs in error not guilty upon the third count charged in the information, and that the jury followed the instruction of the court and found both of the plaintiffs in error not guilty of said third count, said count will not be referred to further in this brief.

From the judgments of the court below, these plaintiffs in error prosecute this writ of error, and assign as grounds for a reversal of said judgments, the matter set forth in the specifications of error.

Specifications of Error.

Plaintiffs in error rely upon the following specifications of error in the prosecution of this writ of error, to-wit:

(1) The verdict of the jury finding the plaintiff in error, J. W. Oliver, guilty of counts four and five of the information, and the judgment and sentence of the court predicated thereon, is against the evidence, and consequently against the law, in that there was

not sufficient legal evidence to establish the guilt of said plaintiff in error of the offenses thereby charged.

(2) The verdict of the jury finding the plaintiff in error, Herman Landfield, guilty of counts first, second, fourth and fifth in said information contained, and the judgment and sentence of the court thereupon, is against the law and the evidence in that the evidence produced by the defendant in error was insufficient to prove the allegations contained in said counts aforesaid in said information.

(3) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error in that the court permitted, over objection of plaintiffs in error, a witness of and for defendant in error, to testify that he had purchased a bottle of Scotch whiskey from one, Ellis, one of the defendants below, same being without the presence of plaintiffs in error.

(4) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, in that the court permitted the witness, Ahlin, a witness of and for defendant in error over objection of plaintiffs in error, to testify that he had purchased liquor from plaintiff in error, Oliver, in October, 1924, which was immaterial and incompetent and irrelevant, being at a time subsequent in point of time to the time of the offenses charged in the informaton, to-wit: On or about August 29th, 1924.

(5) The trial court erred in refusing to direct a verdict of not guilty upon each count of the information as to the plaintiffs in error, Herman Landfield and

J. W. Oliver, at the close of the evidence, upon the ground that the charges contained in the information had not been proven against either of the plaintiffs in error herein.

(6) The trial court erred in refusing to direct a verdict of not guilty as to the plaintiff in error, J. W. Oliver, upon each count in the information contained upon the close of the government's evidence, in that the allegations contained in the information, as to said plaintiff in error, had not been proven.

(7) The trial court erred in itself interrogating the plaintiff in error, Herman Landfield, and over the objections of the plaintiffs in error, directing certain questions to said plaintiff in error, which said questions were improper and argumentative and called for a conclusion of the witness, and were prejudicial to the plaintiffs in error in that the court, by said questions, placed the said plaintiff in error, Landfield, in such a position that to answer the said questions, the said Landfield was compelled to accuse the government agents of having committed a deliberate falsehood.

(8) That the court erred in admitting incompetent evidence to the prejudice of these plaintiffs in error in that the court permitted certain exhibits to be introduced at the trial hereof without any sufficient evidence having been laid for the admission of said testimony.

(9) That the trial court erred in admitting incompetent and immaterial evidence to be introduced to the prejudice of plaintiffs in error, to-wit: That the

court permitted the witness for the defendant in error to testify to a certain raid occurring at the place of plaintiff's in error, and as to what occurred there, and as to the conclusion of the witnesses for the government as to certain matters happening thereat.

(10) That the trial court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, to-wit: In that the court permitted, over the objections of plaintiffs in error, the government to introduce into evidence Government's Exhibit No. III, said exhibit being immaterial and no proper foundation having been laid therefor.

(11) That the trial court erred in its charge to the jury, to the prejudice of these plaintiffs in error, in that the court instructed the jury, contrary to the law as follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts."

(12) That the trial court erred in its charge to the jury, to the prejudice of the defendants, in giving the following instruction, to-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having

sold liquor, and one count with having possession of liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and cooperating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says."

(13) That the trial court erred in its charge to the jury, in that it gave to the jury the following instruc-

tion which is not a correct statement of the law, to-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being

made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant. No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?"

I.

The Verdict of the Jury Finding the Plaintiff in Error, J. W. Oliver, Guilty of Counts Four and Five of the Information, and the Judgment and Sentence of the Court Predicated Thereon, Is Against the Evidence, and Consequently Against the Law, in That There Was Not Sufficient Legal Evidence to Establish the Guilt of Said Plaintiff in Error of the Offenses Thereby Charged.

It will be noted that the counts upon which the plaintiff in error, Oliver, was convicted and sentenced was for having possession of intoxicating liquor on or about the 29th day of August, A. D. ....., and for maintaining a common nuisance on or about the 29th day of August, 1924, at Los Angeles, county of Los Angeles, state of California. It will be noted from the bill of exceptions, which was stipulated to contain a statement of the evidence adduced at said trial, that the plaintiff in error, Oliver, raised the question of the sufficiency of the evidence by a motion for an instructed verdict at the close of the government's case. [Tr. of Record, pp. 63 and 64.]

And also for an instructed verdict at the close of all the evidence in the case. [Tr. of Record, p. 70.] To which ruling upon said motion the plaintiffs in error, then and there duly excepted.

The government's case was presented by three witnesses, to-wit: Mr. I. H. Cory, Mrs. Minnie E. Cory and Mr. C. W. Ahlin. With the exception of Mrs.

Minnie E. Cory, the other two witnesses were prohibition officers. The testimony of all these witnesses, and for the purposes of this argument, the truth of all their testimony will be assumed, and viewed in a most favorable light to the government, as far as the plaintiff in error, Oliver, is concerned, is as follows: The witness Cory testified:

"I arrested Mr. Landfield and Mr. Oliver and this George Cook, who had given me the O. K. card from the first place, and who at that time was acting as a waiter for Mr. Landfield." [Tr. of Record, p. 46.]

"I did not know who the waiter was who brought the lemon juice and cracked ice; I looked for him the night I made the raid and could not find him, a large man, I should judge 5 feet 11. He is not a party to this case." [Tr. of Record, p. 49.]

"The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time." [Tr. of Record, p. 50.]

"I arrested a man by the name of Cook and the Oliver and Landfield." [Tr. of Record, p. 51.]

"These three bottles I had never seen in the possession of the defendant, Landfield, I took them from guests in the place." [Tr. of Record, p. 52.]

The foregoing testimony was the only testimony given by the witness, I. H. Cory, relative to the plaintiff in error, Oliver.

Mrs. Minnie E. Cory, called as a witness in behalf of the defendant in error, testified as follows:

"That she was at the Glendale Tavern on the 28th day of July, 1924, with Mr. Cory and Mr. Hooke;

that she saw the defendant, Herman Landfield, at that time, but not the defendant, J. W. Oliver." [Tr. of Record, p. 53.]

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not. [Tr. of Record, pp. 55 and 56.]

On cross-examination, the witness testified as follows:

"That they inquired as to where Mr. Landfield was from the waiter, but that she could not see if this man was the defendant below, Oliver." [Tr. of Record, p. 56.]

The witness Ahlin testified:

"That on the night of the 30th day of July, 1924, he saw the plaintiffs in error, Landfield and Oliver, at the Glendale Tavern, and that the defendant, Oliver, served *soft drinks* at the table." (Italics are ours.) [Tr. of Record, p. 58.]

The only evidence which in any way would tend to connect Mr. Oliver with any offense against the United States Government is found in the testimony of Agent Ahlin, when he testified, over the objections of the plaintiff in error, that he was out at the Glendale Tavern some time in October and purchased liquor from the plaintiff in error, Oliver. This testimony was objected to by the plaintiffs in error upon the grounds that neither the plaintiff in error, Oliver, or the plaintiff in error, Landfield, were charged with any offense committed in October; that the date of their asserted offense was set forth as the 29th day of August, 1924, in the information, and that the

evidence as to the October offense was too far removed, too remote and incompetent.

The admission of this evidence has been assigned by the plaintiffs in error herein as one of their specifications of error, and since the same will be discussed separately, it is not our intention to burden the court with repetition.

The court will note that the defendant, Oliver, was found guilty, not of selling liquor, but of possession of liquor, and of maintaining a nuisance. We submit that there is absolutely no evidence in the record tending to show even remotely that the said Oliver was guilty of having possession of any alcoholic liquor whatsoever, or of in any manner operating or maintaining or having anything to do with any nuisance whatsoever.

The word *Possess* is defined by Webster: "To have or hold—as property." It has been held to mean the actual control, care and management as distinguished from ownership. (Citing cases from various state jurisdictions.)

(McFadden on Prohibition, page 317.)

While possession may be constructive as well as actual, there is no evidence tending to connect the plaintiff in error, Oliver, either actually or constructively, with having liquor in his possession.

It is true that the court permitted certain evidence to be given of an alleged sale by the plaintiff in error, Oliver, on or about the month of October, 1924, the admission of which testimony it is contended, consti-

tutes error; but said alleged sale is separate from the possession of intoxicating liquor in that the amounts of said liquor and the dates thereof between the sale count and the possession count were far removed. And if this were not the case, it has been held specifically that the offense of unlawful possession of liquor is a crime separate and direct from the crime of the sale of liquor, and is generally conceded by all the authorities.

In commenting on an instruction in the case of Feinberg v. U. S., 2 Fed. Rep. (2nd Series) 955, the court said:

> "Proof of the mere knowledge of the presence of the liquor or of the handling of it as an employee, or of both these facts, did not necessarily show either possession or unlawful possession by the employee."

As far as the count for unlawful possession is concerned, relative to the plaintiff in error, Oliver, the defendant in error is in no better position.

Courts have held specfically that the offense of unlawfully possession liquor is a distinct offense from that of maintaining a nuisance for unlawful selling of liquor.

> Massey v. U. S. (C. C. A.), 281 Fed. 293;
> Page v. U. S. (C. C. A.), 278 Fed. 41;
> Bell v. U. S. (C. C. A.), 285 Fed. 145;
> Singer v. U. S. (C. C. A.), 288 Fed. 695.

It is true that this Honorable Court has held that under certain circumstances, proof of one sale of al-

coholic liquors might tend to establish the maintenance of a nuisance, but the circumstances must be such as to show that a resort or a place where liquor is kept for sale, barter or other commercial purpose is being maintained. Or to state the rule in the language of the courts,

> "The test of a statutory nuisance, therefore, is not the number of sales or the length of time liquor is kept upon the premises, but whether the place is maintained for the keeping and sale of liquor in the sense of the statute."

Singer v. U. S. (C. C. A.), 288 Fed. 695.

Upon the question of what constitutes a nuisance, a majority of the courts hold that a single sale or a single act in violation of the National Prohibition Act, does not constitute the offense of maintaining a nuisance, and the reasoning of some of the decisions is to the effect that by the use of the words "sold," "kept" or "bartered," there was meant either habitually or continuously or concurrently so sold, kept or bartered, and that the word "maintenance" implies continuation or some degree of permanency.

Reynolds v. U. S., 282 Fed. 257;
Hattner v. U. S., 293 Fed. 387.

However, there is nothing inconsistent in the holding of these cases with the holding of this Honorable Court since continuity of wrong doing may appear from, or be implied from the nature and circumstances of a single sale, or other transaction.

In view of the evidence hereinbefore presented, and in view of the further fact that the only proof ad-

duced in the case was to the effect that the plaintiff in error, Oliver, was only a waiter at the premises in question, was not shown to have any proprietory, managerial, supervisory or directory connection with the premises in question, or any control of any liquors therein, the evidence is insufficient, even assuming the competency and relevancy of all the evidence in the record, to sustain a conviction of the counts upon which said plaintiff in error was convicted.

II.

The Verdict of the Jury Finding the Plaintiff in Error, Herman Landfield, Guilty of Counts First, Second, Fourth and Fifth in Said Information Contained, and the Judgment and Sentence of the Court Thereupon, Is Against the Law and the Evidence in That the Evidence Produced by the Defendant in Error Was Insufficient to Prove the Allegations Contained in Said Counts Aforesaid in Said Information.

The defendant below, Herman Landfield, was found guilty in the first count of a sale to the witness, Cory, in the second count, of a sale to the witness, Ahlin, upon the fourth count of possession, and upon the fifth count of maintaining a nuisance.

As we stated in the preceding specification of error, as far as the possession charge was concerned, the evidence shows that the liquor introduced in evidence as Exhibit No. 3 of defendant in error, was taken from guests sitting at the tables of the restaurant,

which plaintiff in error was then managing. The testimony upon this point is as follows:

"The third time we went there was, I believe, on the 28th of August. I went there with a raiding crew." [Tr. of Record, p. 45.]

"During it all, we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin, and one bottle containing Scotch whiskey, about one-half full. * * * Mr. Landfield said, 'Well, I'm not responsible for this stuff in my place.' He said the guests brought it in and he didn't see how he could keep them out. * * * These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here. The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time. * * * These three bottles I had never seen in the possession of the defendant, Landfield. I took them from guests in the place. [Tr. of Record, pp. 45, 46, 49, 50 and 51.]

The witness testified further, that he never obtained any liquor directly from either of the plaintiffs in error. The three bottles seized on this raid were introduced as government's Exhibit No. 3, and the jury convicted the defendant below, Landfield, upon the count charging possession of said bottles of liquor. Consequently there is no proof to show this defendant guilty of possession of said intoxicants.

Relative to the sale to Mr. Cory of a bottle of intoxicating liquor, the testimony is that the witness, Cory, engaged Mr. Landfield in a conversation relative to prize fighting, and then after that Mr. Land-

field told him that he did not serve any mixed up drinks or straight drinks at the table, but that he would get him the makings. That Mr. Landfield then introduced him to Mr. Ellis, and that the witness gave Mr. Ellis $5.00 for the bottle. That Landfield did not actually take the money, but that he was there, and that he, Mr. Cory, came in upon a later occasion and introduced Mr. Ahlin to Mr. Landfield. [Tr. of Record, pp. 40-42.]

Mrs. Minnie E. Cory, the government's witness, testified as follows:

"That Mr. Landfield said he could not serve them any drinks at the table." [Tr. of Record, p. 53.]

"Q. Were you there on any other occasion?

A. No, sir.

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not." [Tr. of Record, pp. 55 and 56.]

"Mr. Landfield said that he would see that we got a bottle of gin."

While it is true that the credibility of the testimony of witnesses is for the jury, it might be herein noticed that according to the witness, Cory, "Ellis is 5 feet, 6 or 7, not so very tall, dark complexion, black eyes, weighing, I should judged, about 175 or 180 pounds." [Tr. of Record, p. 52.]

Minnie E. Cory, another witness for the government, testified, "I have seen Mr. Ellis, and I saw him before the 28th day of July, 1924. He is a man probably 5

feet 10, slender, light complected, or light hair. [Tr. of Record, p. 56.]

The witness, Ahlin, testified that he was introduced to Mr. Landfield by Mr. Cory; that Mr. Ellis came to the table and that the witness was introduced to him. That Mr. Ellis beckoned to him to come over to the little room off the dance room and delivered a bottle of the liquor. The liquor was bought out there at the Glendale Tavern from Mr. Ellis. "The defendant, Landfield, was in the premises some place when I bought it. He was not in my immediate presence when I purchased the liquor from Mr. Ellis. I was in the room by myself with Mr. Ellis." [Tr. of Record, pp. 58 and 59.]

It is respectfully submitted to this Honorable Court that the evidence shows nothing further than the defendant below, Landfield, merely assisted the government's witness to purchase liquor, and that there is no testimony whatsoever in the record tending to show that said defendant below, Landfield, profited in any way whatsoever in the said transactions, or received any money or that there was any relationship between him and the so-called defendant, Ellis, to sell liquor.

A purchaser of liquor is not criminally liable, as the National Prohibition Law is against the sale of liquor and not against the purchase of liquor, and a person who assists the purchaser is not liable.

(McFadden on Prohibition, p. 294.)

Referring once more to the nuisance count upon which this defendant was convicted, we desire to draw

the court's attention to the case of Muncy v. U. S., 289 Fed. 780, where the court said:

> "The only question, therefore, which we have to determine, is whether the evidence of the sale of the pint of liquor, as mentioned, justifies a verdict of guilty of maintaining a nuisance under the terms of the act. As has been already stated, no liquor was found on defendant's person or on premises under her exclusive control. Except as to the pint which the officer claims to have purchased from her, there was no evidence either of sale or possession. It is true the officer claims to have been told by the boy who guided them to the defendant's apartment that he had gotten whiskey from her; but the statement was not made in her presence, and was afterwards denied by the boy when he became a witness in the trial. The defendant conducted a laundry in her apartment and was engaged in that work when arrested, and there is, as far as the record before us shows, an entire absence either of facts or inferences from which we may say that the storage or sale of the whisky was one of the ordinary or usual incidents to the business conducted by the defendant or on her premises. The case made was the case of a single sale—the premises the ordinary home of a woman of the laboring class—and this, we believe, without more, is not enough."

III.

The Court Erred in Admitting Incompetent Evidenc to the Prejudice of Plaintiffs in Error in That the Court Permitted, Over Objection of Plaintiffs in Error, a Witness of and for Defendant in Error, to Testify That He Had Purchased a Bottle of Scotch Whiskey From One, Ellis, One of the Defendants Below, Same Being Without the Presence of Plaintiffs in Error.

The said evidence objected to is as follows:

Q. I will ask you if you have ever seen this bottle before (handing bottle to witness),

A. I have. [Tr. of Record, p. 58.]

Q. Where?

A. It was bought out there at the Glendale Tavern from Mr. Ellis.

Q. Is that the bottle you bought from Mr. Ellis?

A. It is.

Q. Where was the defendant Landfield when you bought that?

A. In the premises some place.

Q. Was he in your immediate presence when you purchased this from Mr. Ellis?

A. I was in the room by myself with Mr. Ellis.

Mr. Williams: I move that all of that testimony be stricken out on behalf of the defendants Landfield and Oliver.

The Court: Denied.

Mr. McGann: Q. Did you examine the contents of that bottle at that time?

A. We did.

Q. What did you ascertain the contents of that bottle to be?

A. Scotch whisky.

Mr. Williams: We object to that as immaterial and no foundation laid.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Q. Did you taste this?

A. Yes, sir. [Tr. of Record, p. 59.]

Q. Was that Scotch whisky?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Mr. Williams: I move that that be stricken out as calling for the conclusion of the witness and no foundation laid.

The Court: Denied.

Mr. Williams: Exception. [Tr. of Record, p. 60.]

It is submitted that this evidence is hearsay evidence, occurring without the presence of plaintiff in error, and should have been excluded by the court.

IV.

The Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, in That the Court Permitted the Witness, Ahlin, a Witness of and for Defendant in Error Over Objection of Plaintiffs in Error, to Testify That He Had Purchased Liquor From Plaintiff in Error, Oliver, in October, 1924, Which Was Immaterial and Incompetent and Irrelevant, Being at a Time Subsequent in Point of Time to the Time of the Offenses Charged in the Information, To-wit. On or About August 29th, 1924.

The said evidence objected to is as follows:

"Mr. McGann: Q. Were you at that address at any other time?

A. I was out there at a later date.

Q. What date?

A. Around in October sometime.

Q. What was the occasion of your visit?

Mr. Williams: We object to any October visit on the ground that it is immaterial, and not within the time charged in this information.

The Court: Denied.

Mr. Williams: The last date mentioned was October.

The Court: They are charged with maintaining a nuisance on or about the 29th day of August, and any time either before or after that, within a reasonable degree, would be relevant.

Mr. Williams: We renew our objection to the October visit on the ground that it is too far removed, too remote, and incompetent.

The Court: Overruled. [Tr. of Record, p. 60.]

Mr. Williams: Exception.

Mr. McGann: Q. What was the purpose of your visit?

A. With Agent Bybee we visited these premises again and we then purchased liquor. This liquor was purchased by me of Oliver in the presence of Mickey Murphy, who was the main proprietor of the place at that time.

Mr. Williams: I move that that all be stricken out as immaterial to the issues contained in this indictment.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. What date was that, if you know?

A. I don't just recall the date; I haven't got my records with me.

Q. Now, were you there at any other time other than the two times you have mentioned?

A. No, sir.

Q. I take it you were not present at the time of the raid?

A. I was not.

Mr. McGann: Take the witness." [Tr. of Record, p. 60.]

It will be noted that this testimony could not have been admissible against the defendant, Landfield, because the witness himself stated that he purchased the liquor of Oliver in the presence of Mickey Murphy, who was then the proprietor of the place, and that there was no evidence in the record that the defendant,

Landfield, was in the place or in the state of California in October, 1924. The sale in October, 1924, was not alleged in the information. The last date mentioned in the information was on or about the 29th day of August, 1924, and in view of the testimony hereinbefore set forth, it may easily be seen how prejudicial this testimony was to the defendants below.

Seasonable objection was made to the admission of said testimony. It did not in any way tend to prove or disprove the issues of the case, was unfair to the defendants below in that they were not apprised of the prosecution's intention to use the said testimony, and consequently could not anticipate it, and therefore could not prepare against it. It is the only testimony in the record tending in any way to involve the defendant below, Oliver, and said testimony does not in any way connect the defendant below, Landfield, with said sale. The general proposition of law upon the point, we believe to be, that

Evidence of sales at times other than those covered by the information should not be received in evidence, as the question of intent is not material in this class of cases.

Hall v. U. S., 150 U. S. 76;
Hurwitz v. U. S., 299 Fed. 449;
Garb v. U. S., 294 Fed. 66;
Carpenter v. U. S., 280 Fed. 598;
Paris v. U. S., 260 Fed. 529;
Beyer v. U. S., 282 Fed. 225.

The court evidently admitted said testimony upon the ground that it might tend to prove or disprove the nuisance, but the nuisance count upon which both of the defendants below, plaintiffs in error herein, were convicted, alleges the nuisance as of date on or about August 29, 1924, and we submit this testimony is too remote to be admissible thereupon.

V.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty Upon Each Count of the Information as to the Plaintiffs in Error, Herman Landfield and J. W. Oliver, at the Close of the Evidence, Upon the Ground That the Charges Contained in the Information Had Not Been Proven Against Either of the Plaintiffs in Error Herein.

VI.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty as to the Plaintiff in Error, J. W. Oliver, Upon Each Count in the Information Contained Upon the Close of the Government's Evidence, in That the Allegations Contained in the Information, as to Said Plaintiff in Error, Had Not Been Proven.

These specifications of error will be considered together as they cover the same proposition of the law. The proceedings had under specification V are as follows:

"Mr. Williams: At this time, in compliance with the practice of this court, I desire at this time to move, on behalf of the defendant, J. W. Oliver, as to count 1 of this information, that the jury be instructed to acquit the defendant, J. W. Oliver, on the ground—

The Court: The motion will be denied, and it may be considered as having been made on behalf of each of the defendants as to each count of the indictment, and denied.

Mr. Williams: I would like to make my motion, if the court please.

The Court: I said it might be considered as made to all defendants on all counts, and denied.

Mr. Williams: I desire to move also as to count 2—

The Court: I said it might be considered as having been made with respect to each defendant and as to each count, and denied.

Mr. Williams: That includes counts 3, count 4 and count 5?

The Court: Yes, and denied. Proceed.

Mr. Williams: Now, on behalf of the defendant, Herman Landfield, I desire to move this court that the jury be instructed—

The Court: It has been suggested, Mr. Williams, that—

Mr. Williams: Wait a minute, if the court please; I haven't made my motion.

The Court: I said it might be considered as to each defendant and each count, and the motion denied.

Mr. Williams: I should like the court to know there are five counts.

The Court: I know there are five counts, and it may be considered as made to five counts by each defendant, and denied.

Mr. Williams: For the purpose of the record—

The Court: So now that ought to be understood, proceed.

Mr. Williams: Very well. Mr. Landfield take the stand, please." [Tr. of Record, pp. 63 and 64.]

Upon the proceedings had relative to specification VI, they are as follows:

"Mr. Williams: The defendants rest, with this exception: I desire at this time to renew my motions.

The Court: Denied.

Mr. Williams: Just a moment. I haven't made my motions.

The Court: It may be considered as having been made and denied.

Mr. Williams: For the purpose of the record I desire to make the motion on behalf of defendants Landfield and Oliver.

The Court: It may be considered as having been made to each defendant on each count, the motion to dismiss on each count, and it is denied. Proceed.

Mr. Williams: I desire to make my motion, if the court please.

The Court: It may be regarded as having been made to each count and as to each defendant, and denied.

Mr. Williams: Exception. On count 3 there is no testimony to substantiate that count, and I move that that be dismissed.

The Court: Denied.

Mr. Williams: I don't want to have any argument.

The Court: Any rebuttal?

Mr. McGann: No rebuttal." [Tr. of Record, p. 70.]

Since the points covered by these specifications have been discussed in specifications of error I and II, we will not take up the time of the court further on these points.

VII.

The Trial Court Erred in Itself Interrogating the Plaintiff in Error, Herman Landfield, and Over the Objections of the Plaintiffs in Error, Directing Certain Questions to Said Plaintiff in Error, Which Said Questions Were Improper and Argumentative and Called for a Conclusion of the Witness, and Were Prejudicial to the Plaintiffs in Error in That the Court, by Said Questions, Placed the Said Plaintiff in Error, Landfield, in Such a Position That to Answer the Said Questions, the Said Landfield Was Compelled to Accuse the Government Agents of Having Committed a Deliberate Falsehood.

The proceedings as they are material to this specification of error, are as follows:

"The Court: Q. Where is this place in Glendale?

A. 1120 South San Fernando boulevard.

Q. Inside of the City of Glendale?

A. Yes, sir.

Q. All of these statements these witnesses have made that they bought liquor there at your place from you or through you is all false?

A. Absolutely, Your Honor.

Q. They have just come here and told a deliberate falsehood?

Mr. Williams: We will have to object to that question, Your Honor, on the ground it is argumentative.

The Court: Overruled.

Mr. Williams: Exception.

The Court: Q. That is a fact, is it not?

A. Yes, sir." [Tr. of Record, p. 68.]

The asking of these questions in such a manner as to compel the defendant to accuse the government's agents of testifying to a deliberate falsehood, these plaintiffs in error assign as error. Since this point will again be discussed in a subsequent specification of error, we will not further discuss it here.

VIII.

That the Court Erred in Admitting Incompetent Evidence to the Prejudice of These Plaintiffs in Error in That the Court Permitted Certain Exhibits to Be Introduced at the Trial Hereof Without Any Sufficient Evidence Having Been Laid for the Admission of Said Testimony.

Since the argument is more or less similar upon the inadmissibility into evidence of these exhibits which were introduced separately, they will be considered together. We will consider the testimony relative to the admission of these exhibits as follows:

"Mr. McGann: Q. Where did you first see that bottle, Mr. Cory?

A. I first saw that bottle when Mr. Ellis handed it to me in the small room in the Glendale Tavern in the presence of Mr. Landfield. I paid him $5.00 for it.

Q. What date was that?

A. It is marked here (indicating) 'Date of buy 7/28/24.' The 28th day of July. 'Paid, $5.50.'

Q. Did you examine the contents of that bottle at the time?

A. I drank two drinks out of it; yes, sir.

Q. What was it?

A. Gin.

Mr. Williams: I object to that as calling for a conclusion of the witness, and no proper foundation laid for the question.

The Court: Do you know gin when you taste it?

A. Yes, sir.

Q. Have you had enough experience to know what it is if you taste it?

Yes, sir.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I will ask that this be admitted in evidence.

Mr. Williams: I object to it on the ground that there is no proper foundation laid for its introduction.

The Court: In what way is there no proper foundation laid?

Mr. Williams: No foundation laid in this: That the witness had not been properly qualified to testify as to what the contents of this bottle is.

The Court: It is a matter of common knowledge what gin contains. Did it contain more than one-half of one per cent of alcohol by volume?

A. It did.

Mr. Williams: I object to that on the ground that the witness is not qualified to testify to that.

The Court: Overruled.

Mr. Williams: Exception.

The Court: All right. Go on." [Tr. of Record, pp. 40, 41 and 42.]

"Mr. McGann: Q. I will ask you to examine this bottle, Mr. Cory.

A. Yes, sir.

Q. Where did you first see that bottle?

A. I saw that bottle first when it came onto the table—rather, when Agent Ahlin took it out of his pocket in the Glendale Tavern.

Q. Did you examine the contents at that time?

A. I had a drink out of it, possibly two.

Q. What would you say the contents of the bottle was?

Mr. Williams: I object to that as immaterial, calling for a conclusion of the witness, and no proper foundation laid.

The Court: Overruled.

Mr. Williams: Exception.

A. I would say that it is Scotch Whisky.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Mr. Williams: We object to his statemnt that he knows Scotch whisky when he tastes it, and I renew my objection that the proper foundation has not been laid.

The Court: Some people, I suppose, know it. This witness says he does. Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time to introduce in evidence Government's Exhibit No. 2.

Mr. Williams: The same objection. No proper foundation laid.

The Court: Overruled. In what respect is the foundation insufficient?

Mr. Williams: It has not been shown what the bottle contains. It might be gingerale, from the color of it, for all we know.

The Court: I know, but color is not the only thing that goes into the consideration of what it is. If he said he looked at the color and said it was Scotch whisky, that would be different, but he didn't do that. He said he tasted it. Overruled.

Mr. Williams: Exception.

(Witness continuing) We stayed there a short time, and as soon as possible, got out of the place, and this bottle was taken back by Agent Ahlin and labeled by himself, and it was also sent to the United States chemist in San Francisco." [Tr. of Record, pp. 43, 44 and 45.]

"Mr. McGann: Q. I will ask you to examine these three bottles.

A. These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here (indicating).

Mr. Williams: I move that 'it shows here' be stricken out as hearsay.

The Court: Denied.

Mr. Williams: Exception.

A. It is on the label here (indicating).

Mr. McGann: Q. Now, did you examine the contents of the three bottles at that time?

A. Yes, sir; I did.

Q. What sort of an examination did you make, Mr. Cory?

A. I sat at the table there making the return on the search warrant, and as the agents found the liquor they brought it over to me and I smelled it and tasted it to make sure what it was, and then I gave Mr. Landfield a return on the search warrant for them.

Q. What did you find the contents of these bottles to be?

A. These two bottles, so called 'gin.' This other bottle is Scotch whisky.

Mr. Williams: I move that that answer be stricken out on the ground there is no proper foundation laid, and calling for a conclusion of the witness.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time, if the court please, that the three bottles, the two bottles of gin and the one bottle of Scotch whisky, be accepted in evidence as Government's Exhibit No. 3.

Mr. Williams: I object to their introduction as immaterial, and no proper foundation laid.

The Court: Are you still bothered with the color, or is it something else?

Mr. Williams: The color looks quite natural. It looks like water.

The Court: In what respect is the foundation insufficient.

Mr. Williams: This witness is not qualified.

The Court: You still know gin and whisky, do you?

A. Yes, sir.

Q. When you taste them?

A. Yes, sir.

Q. And you tasted those bottles?

A. Yes, sir.

Q. And it was gin and whisky?

A. Yes, sir.

Mr. Williams: I object to that and move that the answer be strcken out as immaterial, and object to the introduction of the testimony, on the same ground.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. You testified that the waiter brought you some lemon juice.

Mr. Williams: Has the Government introduced these three bottles?

Mr. McGann: Yes.

Mr. Williams: Has Your Honor ruled upon their introduction?

The Court: Yes.

Mr. Williams: I desire an exception to that ruling." [Tr. of Record, pp. 47 and 48.]

It is submitted that no sufficient foundation was laid for the introduction into evidence of any of said exhibits.

It is an elementary proposition of law that in order to lay a foundation for the introduction into evidence of an exhibit, four things must be shown. First, that the evidence was taken from the defendants; second, the condition of the article taken when it was taken from the defendants; third, that the exhibit sought to be introduced is still in the same condition as it was when it was taken from the defendants; fourth, that the evidence is what it purports to be.

There is not one scintilla of evidence in the record tending to show what was in the bottles introduced in evidence. No chemist testified as to the contents of the said bottles. It was not shown what the analysis thereof was. There was no evidence in the record whatsoever to show that the contents of the bottles had not been changed during the time they were in the chemist's hands, if they were in his hands during all of

said times. Further, the foundation for the introduction into evidence of said articles was lacking in that there was not sufficent showing as to the experience of the witnesses for the defendant in error as to their knowledge of alcoholic liquors, or that they knew what they were drinking and the chemical contents thereof.

IX.

That the Trial Court Erred in Admitting Incompetent and Immaterial Evidence to Be Introduced to the Prejudice of Plaintiffs in Error, To-wit: That the Court Permitted the Witness for the Defendant in Error to Testify to a Certain Raid Occurring at the Place of Plaintiffs in Error, and as to What Occurred There, and as to the Conclusion of the Witnesses for the Government as to Certain Matters Happening thereat.

The said evidence objected to is as follows:

"The third time I went there was, I believe, on the 28th day of August. I went there with a raiding crew." [Rep. Tr., p. 13, line 14, to p. 18, line 10.]

"Mr. McGann: Q. Who was present at the time of the raid?

A. Agent Glynn, Agent Plunkett, Whittier, Hooke, and Agent Cass from San Diego, and Agent Tyson, of the Los Angeles office. We went there on a search warrant which I had procured on affidavit before United States Commissioner Long, alleging these sales.

Mr. Williams: I move it be stricken out as immaterial and not the best evidence.

The Court: Denied. It is harmless.

Mr. Williams: Exception.

Mr. McGann: Q. Then what did you do?

A. We entered the place, and immediately the place was in an uproar.

Mr. Williams: I move that be stricken out as a conclusion.

The Court: Denied. Harmless.

Mr. Williams: Exception.

A. (Continuing.) And bottles were thrown to the floor and broken, bottles and glasses were thrown around, and one agent was assaulted, Agent Cass, I believe.

Mr. Williams: I move that all of that be stricken out as calling for a conclusion of the witness.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) During it all we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin and one bottle containing Scotch whisky, about half full. I arrested Mr. Landfield and Mr. Oliver, and this George Cook, who had given me the o. k. card from the first place, and who at that time was acting as a waiter for Mr. Landfield.

Mr. Williams: I move that that answer be stricken out as immaterial and no foundation laid.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) At that time I took Mr. Landfiend and sat him down in a chair, and he got up and started to run around, and I sat hm down again and told him I didn't want him to get up again or I would put the handcuffs on him, and that he had better be a little quiet. He said, 'Well, I am not responsible for this stuff in my place.' He said, 'The guests brought it in and how am I going to keep them out?'

I said, 'Mr. Landfield, that is your business. If you have liquor that is in the quantity that is in this place, and let your guests bring it in, and you don't stop them, you are responsible, and the Federal Government are going to keep your place clean.'

Mr. Williams: We object to all of that and move that it be stricken out as immaterial." [Tr. of Record, pp. 45 and 46.]

Upon cross-examination, the witness testified as follows:

"During the confusion, Mr. Landfield was running around. I sat Mr. Landfield down and I told him to sit down or I would have to put the handcuffs on him. I told him if he did not sit down that I would knock him down. Everybody in the place seemed to have liquor on the tables or under the tables. *I did not see any liquor on any of the tables; I just judged from general conditions.*" (Italics ours.) [Tr. of Record, p. 51.]

The introduction of which evidence, these plaintiffs in error submit, was highly prejudicial to them.

X.

That the Trial Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, To-wit: In That the Court Permitted, Over the Objections of Plaintiffs in Error, the Government to Introduce Into Evidence Government's Exhibit No. III, Said Exhibit Being Immaterial and No Proper Foundation Having Been Laid Therefor.

The proceedings relative to this specification of error have been hereinbefore set forth, and the argument

thereupon is similar to that set forth in support of plaintiffs' specification of error number VIII.

XI.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of These Plaintiffs in Error, in That the Court Instructed the Jury, Contrary to the Law as Follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts." [Tr. of Record, p. 80.]

By said instruction, the jury was told that if they had "an abiding conviction and belief that the defendant is guilty" it was their duty to convict, we submit is a misstatement of the law in view of the fact that said abiding conviction and belief must be beyond a reasonable doubt.

XII.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of the Defendants in Giving the Following Instruction, To-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having sold liquor, and one count with having possession of

liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the Government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and co-operating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says." [Tr. of Record, pp. 82 and 83.]

By said instruction, the jury was told, "Now, there is evidence in the case—the weight or the sufficiency

of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also", which we submit was not a proper instruction to give the jury in view of the fact that there was no other sufficient evidence as to any other counts charged in the information as to defendants' guilt, and especially as to counts III and IV upon behalf of defendants below, Landfield and Oliver.

By said instruction, the jury was also instructed that certain witnesses had testified that Oliver co-operated or collaborated and knew what was going on, and contributed to it and aided and abetted it "in so far as he did", that they might find the defendant, Oliver, guilty, when there was no testimony in the record to show that Oliver co-operated, collaborated or knew what was going on, or no facts from which said inference could be indulged in.

Said instruction is also erroneous in point of law in that the jury were instructed that if he, the defendant Landfield, aided, abetted or co-operated or made it possible for the liquor to be *purchased* (italics ours) that he would be just as responsible as if he had sold the liquor and taken the money.

XIII.

That the Trial Court Erred in Its Charge to the Jury, in That It Gave to the Jury the Following Instruction Which Is Not a Correct Statement of the Law; To-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to

the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, bcause there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant.

No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?" [Tr. of Record, p. 85.]

Said instruction is erroneous in that it instructed the jury that without any evidence as to what the percentage of the liquid in said bottles was, they could find said defendants below guilty. Said instruction is also erroneous in that the jury was instructed that the defendants were guilty, and had testified falsely, or that they would have to arrive at the conclusion that the government officers came into court and deliberately perjured themselves. There were other conclusions which the jury might have reached consistent with the innocence of the defendants, and also with

the fact that the government witnesses might have been mistaken or some other conclusion not admitting that they had deliberately committed perjury.

The defendants then and there excepted to said instructions heretofore given as follows:

"Mr. Williams: On behalf of the defendants, I desire to note an exception to Your Honor's charge, and the whole thereof, and in particular to the charge as to the court's duty in commenting on the evidence; also I desire to note an exception to Your Honor's charge as to the impeachment of witnesses; I also desire to note an exception to Your Honor's charge on the interest of the defendant Landfield. I also desire to note an exception to Your Honor's charge and comment on principal and accessory, aider and abetter. I also desire to note an exception as to the defendant Oliver. I also desire to note an exception to the instruction and comment on the possession of the liquor. I also desire to note an exception to the comment and instruction as to the alcoholic content of the alleged liquor. I also desire to note an exception to the comment and instruction as to the testimony of the Government officers. I also desire on behalf of the defendants to note an exception to the failure of the court to give the instructions requested by the defendants." [Tr. of Record, p. 88.]

In passing, we ask the court to notice the plain error not specifically assigned, to wit: Count fourth in the information, which is to the effect "That on or about the 29th day of August, A. D. 19—, the defendants below had possession of intoxicating liquor." No amendment was made or offered to the information, and it is the contention of the plaintiffs in error that

the information does not state an offense punishable under the laws of the United States, in that the date in question might have been previous to the going into effect or enactment of the National Prohibition Law; and by the same token, that the Twentieth Century is not over, and that no intendments as to the continuation of the National Prohibition Law throughout the Twentieth Century can be indulged in.

> Where an information fails to state an offense punishable under the laws of the United States, and the question was not presented to the trial court, nevertheless it follows, that a sentence cannot be imposed upon a verdict of guilty as charged in the information or indictment, if the information or indictment does not state an offense punishable under the laws of the United States.
>
> Sonnenberg v. U. S., 264 Fed. 327;
>
> Remus v. U. S., 291 Fed. 513.

In conclusion, it is respectfully submitted that for the errors herein set forth, the judgment of the Honorable Court below, as to each of the plaintiffs in error herein, be reversed.

Respectfully submitted,

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